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No. 97-1930

In the Supreme Court of the United States

OCTOBER TERM, 1997

CESSNA AIRCRAFT COMPANY, PETITIONER

v.

JOHN H. DALTON, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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14 pp

QUESTION PRESENTED

Whether, consistent with the Anti-Deficiency Act, 31 U.S.C. 1341-1342, the statutes governing the apportionment of appropriations, 31 U.S.C. 1501 *et seq.*, and regulations implementing those statutes, an Executive agency may obligate funds after they have been appropriated by statute, but before they have been apportioned and allocated by the Executive Branch.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 126 F.3d 1442. The opinions of the Armed Services Board of Contract Appeals (Pet. App. 1b-68b, 1c-48c) are reported at 93-3 B.C.A. (CCH) ¶ 25,912 and 96-1 B.C.A. (CCH) ¶ 27,966, respectively.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1997. A petition for rehearing was denied on February 27, 1998. Pet. App. 1d-2d. The petition for a writ of certiorari was filed on May 28, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of a contract that the Department of the Navy awarded to petitioner in 1983. The contract required petitioner to provide training and related technical and maintenance support to undergraduate naval flight officers at the Naval Air Station in Pensacola, Florida. The duration of the contract was for five program years, commencing August 1, 1984, and ending September 30, 1988. Pet. App. 5a-6a. Each program year ended on the last day of the government's fiscal year, September 30. *Id.* at 6a. The contract also gave the government an option to extend the contract for three additional years. The contract required that option to be exercised "not later than" October 1, 1988. *Id.* at 5c.

The contract was a multi-year services contract. Multi-year contracting is a method of procuring services without having the total funds available at the time of award. Pet. App. 3c. The contract was funded with annual "Operation and Maintenance" funds which were not available for obligation until October 1 of each fiscal year, and which expired on September 30 of each fiscal year. *Id.* at 4c.

By letter dated April 18, 1988, the Navy's contracting officer informed petitioner of the government's intent to exercise the option to extend the contract for three years. Pet. App. 8a, 9c. As the end of the fiscal year on September 30 approached, however, an Appropriation Act providing the necessary funds for expenditures under the contract, including the exercise of the option, had not been enacted. Accordingly, on September 26, 1988, the Navy's contracting officer advised petitioner that the government would exercise the option by sending the option modification by

facsimile to petitioner's offices on October 1, 1988, which was a Saturday. *Id.* at 36c.

As of Friday, September 30, 1988, the Appropriation Act for Fiscal Year (FY) 1989 had passed Congress, but had not yet been acted on by the President. Pet. App. 12c. On that day, a Navy budget analyst executed a Financial Accounting Data Sheet, post-dated to October 1, 1988, which made available funds for the government's exercise of the option. The document included a proviso that "EXECUTION OF THIS DOCUMENT IS CONTINGENT ON CONGRESSIONAL PASSAGE OF THE FY89 APPROPRIATION ACT OR OTHER AUTHORITY." *Ibid.* Also on September 30, 1988, the Navy contracting officer advised petitioner's personnel to "stand by their fax machines on October 1 to receive the option exercise," which was expected to be issued once the President had signed the Appropriation Act. *Id.* at 9a, 13c.[1]

On October 1, 1988, the contracting officer confirmed that the President had signed the FY 1989 Department of Defense Appropriation Act. She then removed the proviso from the Financial Accounting Data Sheet, signed the contract modification to exercise the three-year option, and transmitted it by facsimile to petitioner's offices. Pet. App. 14c. Following the Navy's exercise of the option, petitioner provided the services required by the contract throughout the three-year option period. *Id.* at 10a.

2. In 1991, petitioner submitted a claim to the Navy's contracting officer for approximately $25.7

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[1] The Navy scheduled no work to be performed by petitioner during the weekend of October 1-2, 1988. The Navy also did not propose, direct, or encourage petitioner to perform services or incur costs during that weekend. Pet. App. 21c-22c.

million in additional compensation, beyond that provided for in the contract, for work that it had performed during the three-year option period. Pet. App. 6b. The contracting officer did not issue a final decision within 60 days, and petitioner appealed that constructive denial of its claim to the Armed Services Board of Contract Appeals (ASBCA). *Ibid.* Petitioner contended, among other things, that the Navy's exercise of the three-year option on October 1, 1988, was ineffective because it took place before the Executive Branch had apportioned and allocated the funds appropriated by Congress for Fiscal Year 1989. Any exercise by the Navy of that option before apportionment and allocation of those funds, petitioner argued, would have violated 31 U.S.C. 1517(a), which prohibits federal officers and employees from making any expenditure or obligation "exceeding * * * an apportionment[,] or * * * the amount permitted by regulations prescribed under [31 U.S.C.] 1514(a) [regarding administrative division of apportionments]." See *id.* at 21a-22a, 8b-9b. Accordingly, petitioner argued, the services it performed between October 1, 1988, and September 30, 1991, should have been compensated as though they had been purchased under a new implied-in-fact contract, rather than the original contract that would have expired on September 30, 1988, but for the option to extend. *Id.* at 16a-17a.

The ASBCA denied petitioner's claim. Pet. App. 1b-68b, 1c-48c. The ASBCA specifically held, *inter alia*, that (1) the Navy's exercise of the three-year option prior to the apportionment of the appropriated funds did not violate Section 1517 (*id.* at 19b-23b); (2) the contracting officer had obtained funding authority to exercise the option (*id.* at 34b-36b); and (3) the

contracting officer had, in fact, properly exercised the option, and petitioner received it within the time allowed by the contract (*id.* at 30c-37c).

3. Petitioner then sought review in the Court of Appeals for the Federal Circuit, which affirmed the decision of the ASBCA. Pet. App. 1a-36a. The court first rejected the government's argument that petitioner lacked standing to contest matters relating to the Navy's compliance with federal funding statutes. *Id.* at 13a-17a. The court concluded that petitioner's claims were "grounded in the [Contract Disputes Act, 41 U.S.C. 607(d)]," rather than the funding statutes as such, Pet. App. 14a, because petitioner contended that its services were performed under an implied-in-fact contract, rather than the original contract, which had purportedly expired on September 30, 1988. *Id.* at 17a.

On the merits, however, the court rejected petitioner's contention that the Navy was prohibited from obligating funds for the option years before the Executive Branch had completed the apportionment process for funds appropriated by Congress for those years. Pet. App. 24a-25a. The court contrasted Section 1517(a), which prohibits federal officials from authorizing obligations "exceeding * * * an apportionment," with the stricter provisions of the Anti-Deficiency Act, 31 U.S.C. 1341(a)(1), prohibiting federal officials from authorizing any obligation "exceeding an amount available in an appropriation" *or* "before an appropriation is made." Pet. App. 24a-25a. "For its part, Section 1517 prohibits government officials or employees from authorizing obligations that exceed apportionments, but says nothing about incurring obligations prior to carrying out the apportionment process. In sum, the relevant statutory provisions do not prohibit government agencies from

incurring contractual obligations before completing the apportionment process." *Id.* at 25a.[2]

The court also held that petitioner was not entitled to rely on a provision in the Department of Defense's Accounting Manual, which states that "apportionments * * * by OMB are required before funds may be obligated." Pet. App. 23a. That provision, the court concluded, is an internal "procedural rule" that does not create any rights enforceable by a contractor. *Id.* at 28a. The Manual merely "encourages Navy officials to follow particular administrative procedures to ensure that obligated funds are properly accounted for, thereby preventing officials from obligating more funds than have been appropriated." *Id.* at 27a.

Finally, the court concluded that the Navy's exercise of its option on October 1, 1988, complied with the terms of the contract, which allowed the Navy to exercise the option "not later than 1 October 1988." Pet. App. 30a. The court found that the Navy's exercise of that option by facsimile message was consis-

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[2] In addition, the court noted, the Navy Comptroller Manual (NCM) specifically contemplates the possibility of incurring obligations before apportionment. Pet. App. 25a. That Manual states that "[a]fter the beginning of the fiscal year and prior to the specific allocation of funds * * * the head of the responsible office * * * is authorized by the Comptroller of the Navy to suballocate funds and to issue allotments under any appropriation act of such fiscal year in such amounts as will not exceed the amount contained in the appropriation warrant or the request for apportionment and allocation submitted to the Controller of the Navy." *Id.* at 25a-26a. This provision, the court concluded, "permits allotments and suballotments to be issued before apportionment." *Id.* at 26a.

tent with the parties' "established practice" of faxing modifications. *Id.* at 31a.

ARGUMENT

The court of appeals' decision that the Navy was legally permitted to exercise its option to extend its contract with petitioner after the Department of Defense's Appropriation Act was enacted, but before funds under that Act were apportioned and allocated, is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Federal law requires that appropriations made by Congress for a definite period "shall be apportioned to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for the period." 31 U.S.C. 1512(a). This requirement of apportionment is intended largely to ensure that federal agencies do not spend their appropriated funds at too rapid a rate, thereby necessitating a supplemental appropriation later in the fiscal year. The President is directed by statute to make apportionments of appropriated funds, 31 U.S.C. 1513(b)(1), and apportionments for funds under Appropriation Acts must be made not later than 20 days before the beginning of the fiscal year for which the appropriation is made or 30 days after the date of the enactment of the Appropriation Act, whichever is later, 31 U.S.C. 1513(b)(2). The President has delegated his responsibility for apportioning funds to the Office of Management and Budget (OMB). See 2 General Accounting Office, *Principles of Federal Appropriation Law* 6-72 (2d ed. 1992).

The statutory requirement that appropriated funds be apportioned is a central aspect of the laws govern-

ing expenditures by federal agencies. Indeed, once funds are apportioned by OMB, federal law prohibits federal officers and employees from spending or obligating funds in excess of any apportionment. 31 U.S.C. 1517(a). Nevertheless, the court of appeals was correct to conclude that Section 1517 does not prohibit federal agencies from obligating previously appropriated funds before the completion of the apportionment process.

Section 1517 provides:

> (a) An officer or employee of the United States Government * * * may not make or authorize an expenditure or obligation exceeding—
>
> (1) an apportionment.

The language of Section 1517(a) stands in marked contrast to that of the Anti-Deficiency Act, which prohibits any government expenditure or obligation of funds either "exceeding an amount available in an appropriation," 31 U.S.C. 1341(a)(1)(A), or "before an appropriation is made," 31 U.S.C. 1341(a)(1)(B). Section 1517 does not contain any prohibition against expenditures or obligations made before the completion of the apportionment process. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted).

It is, moreover, sensible to conclude that Congress would have wanted to permit expenditure . . obligation of appropriated funds in certain circumstances even before they are apportioned by OMB pursuant to the statutory procedure, including the timetables set

forth in 31 U.S.C. 1513(b)(2). In a situation like the one in this case, where the Appropriation Act was signed by the President on the first day of the fiscal year, delaying obligations or expenditures until the apportionment process is completed could result in the disruption of important federal operations, including services authorized under multi-year contracts. Internal agency procedures, moreover, can effectively prevent spending of appropriated funds at too rapid a rate before the apportionment is made. Thus, the court of appeals pointed out that the Navy Comptroller Manual (NCM) ¶ 022064 permits the expenditure of appropriated funds before their apportionment, but only "in such amounts as will not exceed the amount contained in the * * * request for apportionment and allocation submitted to the Comptroller of the Navy." Pet. App. 25a-26a.

The court also correctly determined that no regulatory authority prohibited the Navy from exercising the three-year option before the apportionment of the appropriated funds. The NCM specifically permits contracting officers to expend appropriated funds during the pendency of the apportionment process within limits designated in the Navy's apportionment request. NCM ¶ 022064 provides more completely:

> After the beginning of the fiscal year and prior to the specific allocation of funds pursuant to apportionment to the head of the responsible office[,] * * * the head of the responsible office is authorized by the Comptroller of the Navy to suballocate funds and to issue allotments under any appropriation act of such fiscal year in such amounts as will not exceed the amount contained in the appropriation warrant or the request for

> apportionment and allocation submitted to the Comptroller of the Navy. * * * Upon issuance of the approved budget activity allocations pursuant to apportionment, the limitations of such allocations will apply to all suballocation and allotment action prior to the receipt of such budget activity allocations.

Pet. App. 25a-26a. The Federal Circuit correctly concluded that this "provision permits allotments and suballotments to be issued before apportionment, with restrictions as to their amounts. It would logically follow that obligations may also be incurred, with the same amount restrictions." *Id.* at 26a.[3]

2. Petitioner relies also (Pet. 20) on a provision in the Department of Defense's Accounting Manual to argue that the Navy's exercise of its option was illegal. That contention was properly rejected by the court of appeals. Paragraph 4a of the Manual states: "An apportionment or reapportionment is a distribution made by OMB of amounts available for obligation in an appropriation or fund account. *Except in certain instances* * * * apportionments and reapportionments by OMB are required before funds may be obligated." Pet. App. 13b (emphasis added). That provision does not contradict either the statutes or the NCM provision discussed above, but rather states a general rule that funds should not be spent before they are apportioned, and recognizes the possibility of exceptions to that general rule. In any event, the

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[3] Petitioner (Pet. 21) does not address NCM ¶ 022064, but relies instead upon NCM ¶¶ 073002(2) and 073100 (Pet. App. 24f, 28f). As the Federal Circuit held, these provisions "say nothing about the timing of incurring obligations versus carrying out the apportionment process." *Id.* at 25a.

court correctly concluded (*id.* at 27a) that Paragraph 4a of the Manual is an "internal operating provision for the management of funds within the agency" and does not create any right enforceable by a contractor. The Manual was "not intended primarily to confer important procedural benefits upon individuals," *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532, 539 (1970), but rather was promulgated to establish procedures governing the management of the agency. As such, it does not afford petitioner any private rights enforceable in the courts.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Petitioner (Pet. 23-26) errs in contending that the court of appeals held that it lacked standing. To the contrary, the court expressly held that petitioner had standing to challenge the Navy's compliance with the funding statutes. Pet. App. 13a-17a. The court did hold that the Manual created no enforceable rights for petitioner's benefit (*id.* at 27a), but that holding was phrased in terms of substantive law, not standing.